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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2002 OF 2007

Bipin Vimalchand Jain. Prop.)
Bipinson Jewellers, 3/4, Tamba)
Kanta Building, Mahakali Chawel,)
Mumbadevi Roadm Mumbai-400 003.)..Petitioner.

V/s.

1. Assistant Director of Income-Tax)
(Investigation), Unit IX(1),)
Mumbai, having his office at)
Scindia House, N.M.Road, Ballard)
Pier, Mumbai - 400 038.)

)

2. Assistant Commissioner of Income-)
Tax, Central Circle-8, Mumbai,)
having his office at Old CGO)
Building Annexure, Maharshi Karve)
Road, Mumbai-400 020.)

)

3. Commissioner of Income-tax)
Central Circle-8, Mumbai, having)
his office at Old CGO Building)
Annexure, Maharshi Karve Road,)
Mumbai-400 020.)

)

4. The Union of India, Through the)
Secretary, Ministry of Finance,)
Government of India, North Block)
New Delhi - 110 001.)..Respondents.

Mr.S.N.Inamdar with Atul Jasani for petitioner.

Mr.S.M.Shah with Sandeep Wasnik for respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 17TH OCTOBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard. Rule. Rule made returnable forthwith. By consent of the parties, the petition is taken up for final hearing.

2. The petitioner is carrying business in the name and style of M/s.Bipinson Jewellers. On 29/12/2006 there was a survey action carried out at the business premises of the petitioner. During the course of the search cash amounting Rs.1,28,34,090 was found at the business premises of the petitioner. The petitioner explained that out of the said amount, a sum of Rs.1.14 crores belonged to Bipin Vimalchand Jain, HUF carrying on business in the name of M/s.Vimalson Jewellers. Thereupon, search was carried out at the business premises of M/s.Vimalson Jewellers at 1.10 a.m. on 30/12/2006. On verification of the books of accounts maintained by M/s.Vimalson Jewellers, it was noticed that in the books there was cash balance of Rs.1,22,41,740/- but the cash actually found was Rs.8,38,980/-. The search party found a chit recording transfer of Rs.1.14 crores from the shop premises of Vimalson Jewellers to the shop premises of Bipinson Jewellers. The same was also corroborated in the

statement of Ladharam Chaudhary. The search party found that the sales of the day matched with the cash and stock including the cash sent to the shop premises of M/s.Bipinson Jewellers. In spite of the above, the search party seized Rs.1,20,00,000/- from the shop premises of Bipinson Jewellers.

3. On 29th January, 2007 an application was made by the petitioner under section 132B(1) (i) of the Income Tax Act, 1961 ('Act' for short) inter alia seeking release of the cash amounting to Rs.1.14 crores seized from the petitioner, as the said amount belonged to M/s.Vimalson Jewellers. As no action was taken, the petitioner filed Writ Petition No.1289 of 2007. Similarly, M/s.Vimalson Jewellers had also filed a Writ Petition No.1288 of 2007 to claim the amount of Rs.1.14 crores. This Court disposed of the Writ Petition No.1289 of 2007 filed by the petitioner on 28/8/2007 by directing the respondent No.2 to dispose of the application filed by the petitioner in accordance with law. Thereupon, the petitioner appeared before the respondent No.2 and filed their written submissions.

4. By the impugned order dated 3rd September, 2007 the respondent No.2 rejected the application of the petitioner for release of the cash amounting to Rs.1.14 crores seized on 29th December, 2006.

Challenging the said order, present petition is filed.

5. Mr.Inamdar, learned counsel appearing on behalf of the petitioner submitted that once the explanation given by the petitioner that out of the seized cash a sum of Rs.1.14 crores belongs to M/s.Vimalson Jewellers and the same is verified and found to be correct, the respondent No.2 could not have retained that amount. The presumption under section 292C of the Act that the amount found during the course of search belongs to that person is rebuttable presumption and the same has been rebutted in the present case. In the absence of any existing liability the respondent No.2 could not have rejected the application of the petitioner. Mr.Inamdar further submitted that in the present case the condition precedent for retaining the seized cash are not fulfilled and hence the impugned order is liable to be quashed and set aside. In this connection Mr.Inamdar relied upon a Judgment of the M.P. High Court in the case of **Biaoro Constructions (P) Ltd. V/s. Director of Income Tax** reported in **281 I.T.R. 247 (M.P.).**

6. Mr.Chatterji learned counsel appearing on behalf of the revenue, on the other hand supported the order of the respondent No.2 and submitted that under section 132 B(1)(i) of the Act the seized cash is

required to be applied for satisfying the liabilities on completion of assessment under section 153A of the Act as also the penalty that may be levied. In the present case, the assessment is still to be completed under section 153A of the Act and, therefore, the order passed by the respondent No.2 cannot be faulted.

7. We have carefully considered the rival submissions.

8. Section 132B(1)Ii) of the Act reads as under:-

> "**Application of seized or requisitioned assets.**"
>
> 132B. (1) The assets seized under section 132 or requisitioned under section 132A may be dealt with in the following manner, namely:-
>
> (i) the amount of any existing liability under this Act, the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on completion of the assessment [under section 153A and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be] (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is deemed to be in default, may be recovered out of such assets.

> [**Provided** that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained] to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the Chief Commissioner or Commissioner, to the person from whose custody of the assets were seized;
>
> **Provided further** that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed;"

Thus, under the first proviso to section 132B (1)(i) of the Act on an application made for release of the seized asset, within thirty days from the end of the month in which the asset was seized, the assessing officer on being satisfied regarding the nature and source of acquisition of such asset is empowered to recover the existing liability out of such asset and release the remaining portion of the asset.

9. In the present case, it is not in dispute that the application seeking release of the seized cash to the extent of Rs.1.14 crores is made within 30 days of the seizure. In the impugned order the explanation

given by the petitioner regarding the nature and source of acquisition of the sum of Rs.1.14 crores has not been doubted or found to be unsatisfactory. Even in the affidavit filed in reply to the petition, the revenue has not disputed the averment made in the petition to the effect that the search party had verified the books of M/s.Vimalson Jewellers and found that the explanation given by the petitioner was correct. Once the explanation given by the petitioner regarding the nature and source of acquisition of the seized cash is on verification found to be correct, then the amount of Rs.1.14 crores which belongs to M/s.Vimalson Jewellers, could not be retained by the respondent No.2 by rejecting the application filed by the petitioner.

10. Only reason given in the impugned order for rejecting the application is that the assessment under section 153A of the Act is yet to be finalised. In the absence of any material on record to suggest that the seized cash represents the undisclosed income of the assessee, the respondent No.2 could not have rejected the application made under section 132B (1)(i) of the Act merely on the ground that the assessment under section 153A of the Act was pending. In other words, application under section 132B (1)(i) could be rejected only if the respondent No.2 had reason to believe that

the seized cash represented the undisclosed income of the assessee liable to be assessed in the year in which the search took place. In the impugned order, it is not even remotely suggested that the seized cash represents the undisclosed income of the assessee.

11. In these circumstances, we have no option but to quash and set aside the impugned order dated 3/9/2007 and direct the respondent No.2 to release the seized cash amounting to Rs.1.14 crores to the petitioner along with interest at the rate of 6% per annum from the date of seizure till payment.

12. Rule is made absolute in the above terms with no order as to costs.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)